Supreme Court, U. S.
FILED
MAR 26 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1335

ROBERT ABRAMS, as Attorney General of the State of New York,

Petitioner,

against

DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.,

Respondents,

and

COUNTY OF MONROE, etc.,

Respondents.

On Petition For A Writ of Certiorari To The Court of Appeals Of The State of New York

BRIEF IN OPPOSITION OF RESPONDENTS, DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.

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The Daily Record
Rochester, New York

(5856)

Spaulding Law Printing
Syracuse, New York

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The respondents, David S. Salla, Robert W. Keppley and Lisbon Contractors, Inc., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the Court of Appeals of the State of New York. That decision is reported at 48 N.Y.2d 514 (1979).

QUESTION PRESENTED

Is §222 of the Labor Law of the State of New York, which grants "preference in employment [on public works projects] . . . to citizens of the State of New York who have been residents of the state for at least twelve consecutive months immediately prior to the commencement of their new employment", unconstitutional? All of the Courts below held that §222 is unconstitutional.

STATEMENT OF THE CASE

In the summer of 1976, Lisbon Contractors, Inc. (hereinafter referred to as "Lisbon"), one of the respondents herein, was awarded a contract to construct a sanitary sewer interceptor line in the Town of Greece, County of Monroe, State of New York. (R. 28, R.41 and A. 9)* (Greece is a suburb of Rochester, New York.) This construction project (hereinafter referred to as "the Project") was a New York public works project funded under the Environmental Protection and Pure Waters Acts of the United States and administered by the respondents, the County of Monroe of the State of New York and The Division of Pure Waters of the County of Monroe. (R. 28, R. 41 and A. 9) (These respondents are hereinafter collectively referred to as "the County".) Seventy-five percent of the funding for the Project came from the United States government under the Environmental Protection Act and the Pure Waters Act. (R. 51 and A. 20)

Lisbon is a Pennsylvania corporation specializing in the installation of sanitary sewers. It is the third largest such contractor on the East coast, and the ninth largest in the United States. All of its work is on public works projects, and approximately 40% of its work has been on projects outside the State of Pennsylvania. (R. 51 and A. 19)

*References designated "R" are to pages in the record, and references designated "A" are to pages in the appendix attached to the petition for certiorari.

Lisbon has a crew of experienced supervisory and non-supervisory employees who work with it on projects throughout the East coast, and many of these employees take up residence in the state in which they are working. (R. 51 and A. 19) The respondents, David S. Salla (hereinafter referred to as "Salla"), and Robert W. Keppley (hereinafter referred to as "Keppley"), are two Lisbon employees who took up residence in New York after being assigned to work on the Project. (R. 52 and A. 20)

Lisbon began construction on the Project on September 15, 1976. (R. 52 and A. 10) Salla, an employee of Lisbon since May 1970, began work on the Project in October 1976, and Keppley, an employee of Lisbon since November 1966, began work on the Project in December 1976. (R. 55, R. 58-59 and A. 10) Salla, Keppley and two other Lisbon employees rented an apartment, under a one-year lease, in Rochester, New York when they began work on the Project. (R. 55-56, R. 59 and A. 20)

Shortly after Lisbon began working on the Project, the County wrote to Lisbon and told it to take action to comply with the requirement of §222 of the Labor Law that preference for jobs on the Project be given to persons who had resided in New York for 12 months. (R. 36 and A. 20) Thereafter, numerous discussions took place between representatives of Lisbon and the County and eventually Lisbon was informed that, unless it complied with §222, all of its work on the contract would be suspended. (R. 38 and A. 10)

Because of the threats from the County, Lisbon terminated the employment of Salla and Keppley as well as 11 other of its employees. (R. 53 and A. 20) Lisbon, Salla and Keppley then commenced this action for a judgment declaring that §222 of the Labor Law is unconstitutional.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *There is no conflict between the decision of the New York Court of Appeals and the decisions of this Court or other Federal courts.*

Petitioner, Robert Abrams, as Attorney General of the State of New York (hereinafter referred to as the "State"), argues that there is a conflict between the decision by the Court of Appeals of the State of New York in this case and the decision of a three-judge Federal court in *C.D.R. Enterprises, Ltd. v. Board of Education of the City of New York*, 412 F.Supp. 1164 (E.D.N.Y. 1976), *aff'd without opinion, sub nom., Lefkowitz v. C.D.R. Enterprises, Ltd.*, 429 U.S. 1031 (1977) (hereinafter cited as "*C.D.R. Enterprises*"). The Court in that case was confronted with the question of whether resident aliens could be terminated from their employment on a public works project because of their alien status. The statute was successfully challenged on the ground that, by preferring citizens over aliens, the statute violated the Equal Protection Clause of the United States Constitution. In its decision, the Court stated that "while we need make no determination on the matter here, there is no reason to suppose that New York has a right to impede the *employment* of a New Jersey citizen who has recently moved to New York." 412 F.Supp. at 1171[Emphasis in original].

It is difficult to see how there is any conflict between this language and the decision rendered by the Court of Appeals in the case at bar. The State argues, however, that a distinction has to be made between persons "recently moved" and transient workers such as Salla and Keppley. Even assuming, however, that such a distinction has to be made, this was a distinction not before the Court in *C.D.R. Enterprises*. Therefore, there can be no conflict between the decision in the case at bar and the decision in *C.D.R. Enterprises*.

Although the State points only to the *C.D.R. Enterprises* decision as being in direct conflict with the decision of the New

York Court of Appeals, there are two other cases to which the State refers which it apparently believes are in conflict with the decision of the Court of Appeals.

The State argues that this Court's decision in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (hereinafter cited as "*Hughes*"), indicates that a state may prefer its own residents in access to state-provided employment. Preliminarily, it must be noted that the statute involved in *Hughes* was not challenged under the Privileges and Immunities Clause, the basis of the decision of the Court of Appeals in the case at bar. Even apart from this fact, *Hughes* is distinguishable on several grounds.

The first and most obvious distinction between *Hughes* and the case at bar is that in the case at bar New York funds are not used exclusively on the Project. In fact, the Project was funded by the Environmental Protection Act and the Pure Waters Act of the United States and administered by the County. Seventy-five percent of the funds for the Project came from the United States.

When a public works project in New York is federally funded, the "consumers" of the services of people like Lisbon, Salla and Keppley are United States taxpayers. These "consumers" may well be paying an artificially high price for the services of preferred New Yorkers who may not be able to work as efficiently or as cheaply as people like Lisbon, Salla and Keppley. The burden on interstate commerce is obvious and may be significant. *Cf.*, L. Tribe, *American Constitutional Law* §6-10 (1978).

Linked to this effect on the ultimate "consumer" is the fact that the market in *Hughes* was created by the State. *Hughes* at 809, n. 18. Thus, any burden on the movement of hulks was a burden on an item that would not have been in the stream of commerce except for the Maryland subsidy program. Because of this, the subsidies paid by Maryland to help rid the environment

of abandoned automobiles did not have the effect, as other subsidies might, of forcing consumers in other states to pay higher prices for the commerce in issue.

In addition to these differences, it is also important to note, as this Court did on various occasions in *Hughes*, that out-of-state competitors were not barred from the Maryland market. This Court "emphasize[d] that the . . . amendment [in question], by its terms, does not *require* unlicensed suppliers to deliver hulks in State to receive enhanced prices." *Id.* at 806, n. 15 [Emphasis in original]. Later in its opinion, this Court noted that the hulks in question "remain within Maryland in response to market forces, including that exerted by money from the State." *Id.* at 810.

There is no question that the market forces in *Hughes* were slanted in favor of the delivery of hulks to Maryland processors. However, market forces were still allowed to work. By contrast, §222 does not allow market forces to work. People such as Salla and Keppley do not have the right, under §222, to try to show that it is more advantageous for an employer to hire them than to hire somebody who meets the statute's requirements. Section 222 does not subsidize an employer who hires a New Yorker instead of a person from out of state. Rather, under §222, an absolute preference is given if there is a New York resident able and willing to work on a public works project even though the resident may be less able than persons such as Salla and Keppley.

The State also argues that in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627, n. 6 (1978), this Court declined to express an opinion as to whether a state could restrict to state residents access to state-owned resources or as to whether a state could spend state funds solely on behalf of its residents. In making the statement about state-owned resources, this Court referred to *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 283-90 (1977) and *Toomer v. Witsell*, 334 U.S. 385, 404 (1947). At the particular pages referred to in these cases, this Court discussed

the ability of a state to retain certain natural resources within its borders. In both cases, the natural resources in question were fishes located within the boundaries of the states in question. No such question of retaining natural resources is present in the case at bar.

In making the statement about the spending of state funds solely on behalf of its own residents, this Court cited *Hughes*. The distinctions between *Hughes* and the case at bar already have been discussed.

2. *The legal argument made by the State is not applicable in light of the facts of this case.*

The State argues in its petition for certiorari that two of the questions involved in the case at bar relate to whether a state may, in the expenditure of public funds, prefer the economic welfare of its long-term residents over transients. Assuming, *arguendo*, that a state has the right to prefer its long-term residents in the expenditure of state funds, this issue is not posed by the case at bar. As already pointed out, 75% of the funds for the Project came from the United States. Thus, it is mostly federal funds, not state funds, which are being expended for the benefit of long-term New York residents.

The State argues, however, that the presence of federal financial assistance is no more relevant in the case at bar than was the fact that elk hunting took place primarily on federal lands in *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371 (1978). However, in its decision in that case, this Court drew a line relating to "distinctions between residents and nonresidents [which] merely reflect the fact that this is a Nation composed of individual States, and are permitted [and] other distinctions [which] are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States." *Id.* at 383. This Court went on to point out that some activities were so basic and fundamental that interference

with them would frustrate the purpose of the Union. Recreational big game hunting was not such an activity, but clearly "a nonresident's right to pursue a livelihood in a state other than his own [is] a right that is protected by the Privileges and Immunities Clause." *Id.* at 386.

3. *It is not clear from the record in this case that Salla and Keppley are transients, and if they are New York residents, a distinction between them and other New York residents based on duration of residency is unconstitutional.*

The State repeatedly refers to Salla and Keppley as transients. However, Salla and Keppley both took a year's lease on apartments in Rochester, New York when they began work on the Project and planned to live in Rochester for at least that long. Had the Project lasted for more than a year, they would have continued to live in Rochester. There is, therefore, despite the State's references to Salla and Keppley as transients, a real question as to whether they were residents of New York. *See, Corwin Consultants, Inc. v. Interpublic Group of Companies, Inc.*, 512 F.2d 605, 609-610 (2d Cir. 1975) (The Court referred to the nebulous nature of the concept of residency and said that a person could have more than one residence.) *Cf., Vlandis v. Kline*, 412 U.S. 441, 452 (1973). If this Court were to hear this case, the abstract legal issue of whether transients have a right to employment on public works projects would not be presented as sharply as the State implies as it would be necessary to determine whether Salla and Keppley were residents or transients.

If Salla and Keppley are deemed to be New York residents, it has to be conceded that they had not been residents for 12 months before starting work on the Project. Therefore, it might be argued that the durational residency requirement of the statute could be considered by this Court. However, durational residency requirements consistently have been held unconstitutional by this Court upon the ground that such requirements infringe upon fundamental constitutional rights, including the right to travel among the states. Such restrictions will be held constitutional only when found necessary to promote a compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

There is nothing in the case at bar to show that a compelling governmental interest was served by the enactment of §222. The State contends that 60% of the workers in the heavy construction trades in Monroe County were unemployed in 1976, but there is no indication in the record as to any relationship between this unemployment and the fact that certain workers come from out-of-state to work in New York. There are, in short, no facts to show that the out-of-state workers are a source of the high unemployment.

Even if it is assumed that such workers are a source of the unemployment, an attempt to save money for its long-term residents would not be a sufficient justification for New York to infringe fundamental constitutional rights of its new residents. To permit this "would logically permit the State to bar new residents from schools, parks and libraries or deprive them of police or fire protection." *Shapiro v. Thompson, supra* at 632.

4. *Any decision based upon the determination that Salla and Keppley are transients would be of limited application because many other persons could challenge §222 on the ground that it violates the Equal Protection Clause.*

Even if it is assumed that Salla and Keppley were only transients and thus not entitled to challenge §222 on Equal Protection grounds, such a decision would have limited effect. It is clear that the statute does infringe the right to travel by penalizing persons who come to New York and who want to work on public works projects. If these persons are not allowed, because of the prohibition of §222, to gain employment on a

public works project, their ability to travel freely from state to state will have been impaired, and they could challenge the requirements of §222 as being in violation of their rights under the Equal Protection Clause.

It also is clear that §222 will deter travel for certain persons who want to move to New York but who want to seek employment on public works projects. However, it is not even necessary to show that persons have been deterred from traveling to New York by the effect of §222. An argument was made in *Dunn v. Blumstein*, 405 U.S. 330, 339-40 (1972), that the statute in question had to be intended to deter travel, and this Court responded by stating:

> This view represents a fundamental misunderstanding of the law. . . . *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel]. . . ." *Id.*, at 634 (emphasis added). Indeed, none of the litigants [in *Shapiro*] had themselves been deterred.

The State argues that people coming to New York from other states still have the right to compete for jobs in the private sector. However, the limitation on the right of persons outside New York to come to New York and have the opportunity to immediately secure employment on a public works project is significant given the amount of public works projects in New York. The importance of such a limitation was recognized in *Nehring v. Ariyoshi*, 443 F.Supp. 228, 237 (D. Hawaii 1977), in which the Court invalidated Hawaii's one-year durational residency requirement for public employment, concluding that such a statute penalized the right to travel:

> [T]he forced inability of a new resident to apply for 12% of the available jobs is a penalty, particularly for those

> people trained for work performed primarily by government. Even though private jobs are still available, the universe of potential jobs is smaller.

To sum up, even if Salla and Keppley are transients, the effect of §222 might be saved only as to them and persons like them. However, any person penalized for traveling to New York to reside in New York would be able to challenge §222 on Equal Protection grounds.

5. *The decisions of the New York courts which considered this case were correct, and this Court need not further review this case.*

The Court of Appeals of the State of New York considered only the Privileges and Immunities Clause of the United States Constitution in rendering its decision. The Appellate Division, from which an appeal was taken to the Court of Appeals, considered both the Privileges and Immunities Clause and the Commerce Clause. The Supreme Court of the State of New York considered both of these grounds and, in addition, the Equal Protection argument advanced by Lisbon, Salla and Keppley. On all three of these bases, the unconstitutionality of §222 is clearly shown and this Court need not further review the issue of the constitutionality of §222.

Any questions concerning the scope of the Privileges and Immunities Clause and its application to the case at bar were resolved by this Court's decisions in *Hicklin v. Orbeck*, 437 U.S. 518 (1978) and *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371 (1978). These cases make it clear that "one of the privileges which the [Privileges and Immunities] Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer v. Witsell*, 334 U.S. 385, 396 (1947).

The "public resource" exception to the Privileges and Immunities Clause has no bearing on the case at bar. While the

State does not indicate in its petition what it considers to be the "public resource" involved in the case at bar, presumably the public resource in question is the limited amount of money which New York has. While it might be argued that there is no reason to distinguish between a natural resource and money, cases involving the public resource (or ownership) doctrine have been concerned with natural resources and not with money. *See, Corfield v. Coryell,* 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (oyster beds); *McCready v. Virginia,* 94 U.S. 391 (1877) (oyster beds); *Geer v. Connecticut,* 161 U.S. 519 (1896) (game birds), *overruled, Hughes v. Oklahoma,* 441 U.S. 322 (1979); *State v. Kemp,* 73 S.D. 458, 44 N.W. 2d 213 (1950), *appeal dismissed,* 340 U.S. 923 (1951); (migratory water fowl); *Baldwin v. Fish & Game Comm'n of Montana, supra* (elk); *Hicklin v. Orbeck, supra* (oil and gas).

If one accepts the argument that, because money is a limited public resource, discrimination based on the lack of such money does not violate the Privileges and Immunities Clause, the Clause would effectively be rendered a nullity. Certainly, all states have too little money. If, however, this is considered a "natural" resource which constitutionally may be hoarded for state residents, such an exception to the Privileges and Immunities Clause would swallow up the Clause. States would be able to say that a discrimination against out-of-state residents enhances the health and welfare of the state residents by protecting their jobs from out-of-state competition, thereby assuring that the state residents would not be forced to go on welfare. This Court has recognized, in a related context, that such an argument can not be accepted. *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 522-23 (1935). *See also, Brown v. Anderson,* 202 F.Supp. 96, 101-102 (D. Alas. 1962).

It may be thought that because the work of Salla and Keppley involves public employment the State is held to a lesser standard. It is clear, however, that the work of Salla and Keppley is "public employment" only in the loosest sense of the term. The

work they are performing is work in "the common occupations of the community". *Truax v. Raich,* 239 U.S. 33, 41 (1915). They are not engaged in any sense in work which involves the right to govern citizens of New York or in work which involves participation in the formulation and execution of important state policy. *Ambach v. Norwick,* 441 U.S. 68 (1979); *Foley v. Connelie,* 435 U.S. 291 (1978).

The argument against the constitutionality of this statute under the Equal Protection Clause already has been discussed. While the Equal Protection ground was not reached by either the Appellate Division or the New York Court of Appeals, the Appellate Division did decide that the statute was unconstitutional as being in violation of the Commerce Clause of the United States Constitution.

Essentially, the legislation in question is designed to protect job opportunities for New York residents. This Court has consistently rejected such economic protectionism as being a *per se* violation of the Commerce Clause. *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977).

The argument repeatedly has been made by the State that New York simply is spending its own money and has a right to prefer its residents in the spending of these monies. However, 75% of this project is federally funded and, therefore, residents of other states are being asked to subsidize a scheme that New York ostensibly developed to try to help deal with unemployment in the construction industry. The record in this case reveals that Lisbon has a crew of supervisory employees who have worked with it for a number of years. Obviously, these crews work more efficiently, and at a lower cost, than would persons who do not have experience with Lisbon. To the extent, therefore, that Lisbon is forced to hire persons who may not be as experienced in the type of work being done or decides not to compete in New York because it is unable to use its regular

employees, the basic purpose of the Commerce Clause, to promote free trade among the states, is frustrated. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 335 (1977). For this reason as well, §222 is unconstitutional.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Dated: March 24, 1980
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